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UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 26.

FRANCESCA L. DE MARTIN, APPELLANT,

vs.

JAMES D. PHELAN, ALICE PHELAN, AND ALICE P. PHELAN, EXECUTOR AND EXECUTRICES OF JAMES PHELAN, DECEASED.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

FILED

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1 & 2 No. 26.

In the United States Circuit Court of Appeals for the Ninth Circuit.

FRANCISCA L. DE MARTIN, Appellant,
v.
JAMES PHELAN, Appellee.

Transcript of the Record.

Upon appeal from the circuit court of the United States for the northern district of California.

George D. Collins, attorney for appellant.
Frank J. Sullivan and W. F. Herrin, attorneys for appellee.

Endorsed: Filed Feb. 26, 1892. F. D. Monckton, clerk.

3 In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

FRANCISCA LEYBA DE MARTIN, Complainant,
v.
JAMES PHELAN, Defendant.

Transcript of Record.

Bill in equity.

To the judges of the circuit court of the United States for the northern district of California:

4 Francisca Leyba de Martin, of San Francisco, in the State of California, and a citizen of Mexico, brings this, her bill, against James Phelan, of San Francisco, in the State of California, and a citizen of the State of California. And thereupon your oratrix complains and says that heretofore on the 4th day of November, 1881, she was the owner and seized in fee of all those certain pieces or parcels of land, situate, lying and being in the county of Santa Clara, in the State of California, and particularly bounded and described as follows, to wit:

Lot seven in block two, range two, north of the base line in the city of San José, in said county and State; also, lot two, block one, range two, north of the base line in the city of San José, in said county and State; also lots one, two, three and four in block one of range seven, north of the base line in said city of San José, county and State aforesaid; also, that other tract or parcel of land lying, situate and being in said city of San José, bounded and described as follows, to wit: Beginning on the westerly line of Second street at a point distant two hundred and seventy-five and $\frac{68}{100}$ feet southerly from the southern line of Santa Clara street; and from said point running southerly along the aforesaid line of Second street

eighty-two and $\frac{34}{100}$ feet; thence westerly and parallel with Santa Clara street, one hundred and thirty-seven and $\frac{84}{100}$ feet; thence northerly and parallel with Second street eighty-two and $\frac{34}{100}$ feet, thence easterly and parallel with Santa Clara street one hundred and thirty-seven and $\frac{84}{100}$ feet to the point of beginning, and being a part of lot five in block one,
5 range two, north of the base line. Also, that other tract or parcel of land lying, situate and being in said city of San José, and bounded and described as follows, to wit: Beginning on the easterly line of Market street at a point distant one hundred varas northerly from the northern line of St. John street; running thence northerly along said line of Market street twenty and $\frac{5}{6}$ varas; thence easterly and parallel with St. John street fifty varas; thence southerly and parallel with Market street twenty and $\frac{5}{6}$ varas; and thence westerly fifty varas to the point of beginning, and being the south part of lot four, in block three, of range one, north of the base line. Also, those other tracts or parcels of land lying, situate and being in said city of San José, and known and described upon the map or plat of said city as the north half ($\frac{1}{2}$) of lot four and full lot five, in block two, of range one, north of the base line, and particularly bounded and described as being on the easterly line of Market street, at a point distant fifty varas southerly from the southern line of St. John street, and running thence southerly along the line of Market street twenty-five varas; thence easterly at right angles fifty varas; thence southerly at right angles twenty-five varas; thence easterly at right angles fifty varas; thence northerly at right angles fifty varas; and thence westerly at right angles one hundred varas to the place of beginning. Also,
6 that other tract or parcel of land lying, situate and being in said city of San José, and bounded and described as follows, to wit: Beginning at the intersection of the northerly line of Taylor street with the easterly line of First street; and running thence northerly and along the easterly line of First street seventeen hundred and seventy-four and $\frac{8}{100}$ feet to the northwestern boundary line of said city; thence easterly at right angles along said boundary line thirty-one hundred and forty-one and $\frac{12}{100}$ feet to the westerly line of Tenth street (prolonged); thence southerly at right angles along said line of Tenth street seventeen hundred and seventy-four and $\frac{8}{100}$ feet to the northerly line of Taylor street; and thence westerly along said line of Taylor street thirty-one hundred and forty-one and $\frac{12}{100}$ feet to the point of beginning, and containing one hundred and twenty-eight acres of land. Also, that other tract or parcel of land lying, situate and being in said county of Santa Clara, and bounded and described as follows, to wit: Beginning at a stake in the east line of First street at its intersection with the northwest boundary line of the city of San José (proper); running thence along said boundary line north fifty-nine degrees and twenty minutes east forty-seven and $\frac{63}{100}$ chains to the southwestern boundary of 500-acre lot 18; thence along said boundary north to thirty-eight degrees nineteen minutes west six and $\frac{78}{100}$ chains to stake marked "No. 2," at the southeast corner of Younger's land;

thence along the southeast boundary of land of said Younger south fifty-nine degrees and twenty minutes west forty-seven and $\frac{63}{100}$
7 chains to a stake marked "No. 1," on the east line of First street; and thence along said line southerly six and $\frac{78}{100}$ chains to the place of beginning, and containing thirty-two and $\frac{29}{100}$ acres of land. Also, that other tract or parcel of land lying, situate and being in the city of San José, in said county and State, and bounded and described as follows, to wit: Beginning at the intersection of the southerly line of El Dorado street with the westerly line of First street; running thence southerly along said line of First street forty-four feet; thence westerly and parallel with El Dorado street one hundred and thirty-seven and $\frac{77}{100}$ feet; thence northerly and parallel with First street forty-four feet to the southerly line of El Dorado street; and thence easterly along said line of El Dorado street one hundred and thirty-seven and $\frac{77}{100}$ feet to the point of beginning. Also, those other tracts or parcels of land lying, situate and being in said city of San José, in said county and State, known and described upon the map or plat of said city as lots 6 and 7, in block 2, range 1, north of the base line. Also, that other tract or parcel of land lying, situate and being in said county of Santa Clara, and State aforesaid, and bounded and described as follows, to wit: Beginning at a stake marked "No. 1," on the northwesterly boundary line of 500-acre lot No. 9, at the intersection of the east line of the Monterey road with said boundary; and running thence along said boundary north forty-nine degrees and twenty-eight minutes
8 east fifty-nine and $\frac{69}{100}$ chains to a stake marked "No. 2," on the west line of a road; then along said line of road south thirty-seven degrees and forty-nine minutes east forty-six and $\frac{49}{100}$ chains to a stake marked "No. 3," at the corner of land now or formerly owned by Dubois; thence along the northwest boundary of said land of Dubois south fifty degrees and five minutes west fifty-nine and $\frac{8}{100}$ chains to a stake marked "No. 4," upon the east line of Monterey road; and thence along said line of road north thirty-eight degrees and ten minutes west forty-six and $\frac{24}{100}$ chains to the place of beginning, and containing two hundred and seventy-four and four-fifths acres of land, and being part of 500-acre lot No. 9, saving and excepting therefrom four and $\frac{23}{100}$ acres now used and occupied by the Southern Pacific Railroad Company for its railroad.

That on said 4th day of November, 1881, and for some time prior thereto, said property was subject to mortgage liens, two of which were held by the Bank of San José, a corporation, and the other by one David Belden, aggregating the sum of one hundred and eighty-five thousand dollars; that the said mortgage liens held by the Bank of San José were foreclosed on the 13th day of August, 1881, by judgment and decree of the superior court in and for the county of Santa Clara, in said State of California, but prior to said decree all of said mortgage liens were assigned and transferred to said defendant; that said defendant purchased said mortgage and indebtedness as a means
9 of securing the title to said property, and for no other pur-

pose. That at the time of said purchase, to wit, the 13th day of August, 1881, your oratrix had no available means of support for herself and family, and was in indigent circumstances and in great need, and such continued to be her condition up to and including the 4th day of November, 1881; all of which said defendant well knew during all said time. That said defendant thereupon took advantage of the destitute condition of your oratrix, and by means of the said mortgage indebtedness, purchased by him as aforesaid, induced your oratrix to transfer the said property to him in consideration of the sum of nineteen thousand dollars, and thereupon, on the 4th day of November, 1881, your oratrix did make, execute and deliver to said defendant a deed of conveyance to said property in consideration of said sum of nineteen thousand dollars, and because of her helpless and destitute condition aforesaid, of which said defendant took advantage in securing said deed. That at the time of purchase of said mortgage indebtedness, to wit, August 13, 1881, and thence until the said 4th day of November, 1881, the interest of your oratrix in said property, to wit, the equity of redemption, was of the value of forty-five thousand five hundred dollars and more, which the said defendant during all said times knew; and in taking the interest of your oratrix in said property, and paying therefor the sum of nineteen thousand dollars, the said defendant took
10 advantage of his position as holder of said mortgage indebtedness, and of the helpless and poverty-stricken condition of your oratrix. Your oratrix further avers: That the rents, issues and profits of said property received by defendant since said 4th day of November, 1881, amount to the sum of one hundred thousand dollars. That your oratrix is and always has been ready and willing, and hereby offers, to pay said defendant the said sum of nineteen thousand dollars, with legal interest thereon, and also the amount of said mortgage indebtedness with interest and costs, and to redeem said property from said mortgage liens and said judgment.

That said defendant has been absent from said State of California for a period aggregating four years since the 4th day of November, 1881. Wherefore your oratrix prays that notwithstanding said deed executed by her to defendant, she be adjudged entitled to redeem said property; that an accounting of the rents, issues and profits received by defendant therefrom since the 4th day of November, 1881, be ordered by this court, and your oratrix be credited therewith accordingly upon such redemption; and for such other further or different relief as may be conformable to equity and good conscience, and as the nature and circumstances of this case may require, and shall seem meet to this honorable court.

May it please your honors to grant unto your oratrix a
11 writ of subpœna, to be directed to the said James Phelan, thereby commanding him at a certain day and under a certain pain therein to be limited personally to appear before this honorable court, and then and there full, true, direct and perfect answers make to all and singular the premises; and further, to stand to, perform and abide such further order, direction, and de-

cree therein as to this honorable court shall seem meet. And your oratrix shall ever pray.

GEORGE D. COLLINS,
Counsel and Solicitor for Complainant,
Francisca Leyba de Martin.

Endorsed: Filed September 16, 1890. L. S. B. Sawyer, clerk.

Subpœna.

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California. In Equity.

The President of the United States of America—Greeting to James Phelan:

You are hereby commanded that you be and appear in said circuit court of the United States aforesaid, at the court-room in San Francisco, on the third day of November, A. D. 1890, to answer
12 a bill of complaint exhibited against you in said court by Francisca Leyba de Martin, who is a citizen of Mexico, and to do and receive what the said court shall have considered in that behalf. And this you are not to omit, under the penalty of five thousand dollars.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 16th day of September, in the year of our Lord one thousand eight hundred and ninety, and of our Independence the 115th.

[SEAL.] L. S. B. SAWYER, *Clerk.*

Memorandum Pursuant to Rule 12, *Supreme Court U. S.*

You are hereby required to enter your appearance in the above suit, on or before the first Monday of November next, at the clerk's office of said court, pursuant to said bill; otherwise the said bill will be taken *pro confesso.*

L. S. B. SAWYER, *Clerk.*

Endorsed.

UNITED STATES MARSHAL'S OFFICE,
NORTHERN DISTRICT OF CALIFORNIA.

I hereby certify that I received the within writ on the 16th day of September, 1890, and personally served the same on the 15th day of October, 1890, on James Phelan, by delivering to and leaving

with James Phelan, said defendant named herein, personally, at the city and county of San Francisco, in said district, an attested copy thereof.

[SEAL.] W. G. LONG, *U. S. Marshal*,
By JAMES R. DEANE, *Deputy*.

San Francisco, October 15, 1890.

Filed October 15, 1890.

L. S. B. SAWYER, *Clerk*,
By F. D. MONCKTON,
Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

FRANCISCA LEYBA DE MARTIN, Complainant,
v.
JAMES PHELAN, Defendant.
} No. 10884. In Equity.

Demurrer to Bill.

The demurrer of the above-named defendant, James Phelan, to the bill of complaint of the above-named plaintiff.

This defendant by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained to be true in such manner and form as the same are herein set forth and alleged, doth demur to the said bill, and for cause of demurrer showeth:

1. That it appeareth by the plaintiff's own showing that
14 he is not entitled to the relief prayed by the bill, or to any relief in equity against this defendant.

2. That the said bill does not state that the deed of conveyance therein described was intended by the parties thereto, or either of them, as security for money loaned, or for any indebtedness of plaintiff to defendant.

3. That the said bill does not state or show that this defendant took any unfair or grossly oppressive advantage of plaintiff's necessities, or exercised any undue influence over said plaintiff, or that the consent of plaintiff would not have been given to the said conveyance had such cause not existed; or that plaintiff has ever notified this defendant of her intention to rescind said conveyance, or has ever offered this defendant before the bringing of this suit to restore everything of value received from defendant by plaintiff in consideration of said conveyance; or that plaintiff exercised reasonable diligence to rescind the said conveyance promptly upon discovering the facts entitling her to rescind the said conveyance.

4. That the bill shows on its face that plaintiff has been guilty of laches, and that her right to relief is and ought to be barred in equity by the provisions of section 343 of the Code of Civil Procedure of the State of California.

Wherefore, and for divers other good causes of demurrer appearing on said bill, this defendant doth demur thereto, and he prays the judgment of this honorable court whether he shall be compelled to make any answer to the said bill; and he humbly
15 prays to be hence dismissed with his reasonable costs in this behalf expended.

FRANK J. SULLIVAN,
WM. F. HERRIN,
Solicitors for Defendant.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

WM. F. HERRIN,
Of Counsel for Defendant, James Phelan.

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

James Phelan being duly sworn, deposes and says that he is the defendant above named, and that the foregoing demurrer is not interposed for delay.

JAMES PHELAN.

Subscribed and sworn to before me this 24th day of November, 1890.

[SEAL.] R. D. McELROY,
Notary Public.

Endorsed: Due service of a true copy of the within demurrer, at the city and county of San Francisco, this first day of December, A. D. 1890, is hereby admitted. Geo. D. Collins, solicitor for complainant. Filed December 1, 1890. L. S. B. Sawyer, clerk.

16 *Copy of Order Sustaining Demurrer.*

At a stated term, to wit: the July term, A. D. 1891, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, held at the court-room in the city and county of San Francisco, on Monday, the 14th day of September, in the year of our Lord one thousand eight hundred and ninety-one.

Present: The Honorable James H. Beatty, U. S. district judge, district of Idaho; the Honorable Thomas P. Hawley, U. S. district judge, district of Nevada.

FRANCISCA LEYBA DE MARTIN
v.
JAMES PHELAN. } No. 10884.

The demurrer to the bill of complaint heretofore argued and submitted to the court for consideration, having been duly considered, and the opinion of the court having been read, it is ordered that

said demurrer be and the same hereby is sustained, with leave to complainant to amend said bill of complaint on or before the next rule day.

17 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

FRANCISCA L. DE MARTIN, Complainant,
v.
JAMES PHELAN, Respondent. } No. 10884.

Enrollment.

The complainant filed her bill of complaint herein on the 16th day of September, 1890, which is hereto annexed.

A subpœna to appear and answer in said cause was thereupon issued, returnable on the 3d day of November, A. D. 1890, which is hereto annexed. The respondent appeared herein on the 3d day of November, 1890, by William F. Herrin and Frank J. Sullivan, Esqs., his solicitors.

On the 1st day of December, 1890, a demurrer was filed herein, which is hereto annexed.

On the 14th day of September, 1891, an order sustaining said demurrer was made and entered, a copy of which order is hereto annexed.

Thereafter a decree was duly signed, filed and entered, in the words and figures following, to wit: At a stated term, to wit, the July term, A. D. 1891, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, held at the court-room in the city and
18 county of San Francisco, on Friday, the 16th day of October, in the year of our Lord one thousand eight hundred and ninety-one.

Present: The Honorable Thomas P. Hawley, U. S. district judge, district of Nevada, assigned to hold and holding circuit court of the United States for the northern district of California.

FRANCISCA LEYBA DE MARTIN, Complainant,
v.
JAMES PHELAN, Defendant. } No. 10884.

Decree.

The demurrer to the bill of complaint herein having been duly considered and sustained for want of equity in the bill on the 14th day of September, 1891, and the complainant having been granted until the first Monday in October, 1891, in which to file an amended bill, and the complainant having failed to file said amended bill within the time allowed therefor, or to obtain any extension of time for filing the same; now, therefore, it is ordered, adjudged and decreed that complainant's bill of complaint be and the same is hereby dismissed, and that the defendant James Phelan do have and re-

cover of and from the complainant Fracisca Leyba de Martin, his costs herein expended.

HAWLEY, *Judge.*

Endorsed: Filed and entered October 16, 1891. L. S. B. Sawyer, clerk.

19 Whereupon said pleadings, subpœna, copy of order and decree are hereto annexed, said final decree being duly signed, filed, and enrolled, pursuant to the practice of said circuit court.

Attest, etc.

[SEAL.]

L. S. B. SAWYER, *Clerk,*
By W. B. BEAIZLEY,
Deputy Clerk.

Endorsed: Enrolled papers. Filed October 16, 1891. L. S. B. Sawyer, clerk. By W. B. Beaizley, deputy clerk.

In the Circuit Court of the United States of America, Ninth Judicial Circuit, Northern District of California.

FRANCISCA L. DE MARTIN, Appellant,
v.
JAMES PHELAN, Respondent.
} On Appeal.

Assignment of Errors.

Comes now Francisca L. de Martin, the appellant herein, by George D. Collins, her attorney and solicitor, and says that the said circuit court of the United States committed manifest error in sustaining the demurrer interposed by the defendant and respondent in the above-entitled suit, and accordingly committed manifest error in rendering and entering its judgment and decree thereupon in favor of said defendant and respondent. All of which is apparent from the record and proceedings in said suit. Whereas by the law of the land, the judgment and decree of said court ought to have been given for the said plaintiff and appellant, Francisca L. de Martin, and against the said defendant and respondent, James Phelan, and the said appellant Francisca L. de Martin prays the judgment and decree aforesaid be reversed, annulled, and altogether held for naught, and that she be restored to whatever she has lost by occasion of the said judgment and decree.

20

GEORGE D. COLLINS,
Attorney for said Appellant, Francisca L. de Martin.

Endorsed: Filed December 30, 1891. L. S. B. Sawyer, clerk.

In the Circuit Court of the United States of America, Ninth Judicial Circuit, Northern District of California.

FRANCISCA L. DE MARTIN, Appellant,
v.
JAMES PHELAN, Respondent.

Appeal and Allowance Thereof.

The above-named plaintiff and complainant, Francisca L. de Martin, considering herself aggrieved by the decree and
21 judgment of said court, entered in the above-entitled suit on the 16th day of October, 1891, doth hereby appeal from the said decree and judgment, to the United States circuit court of appeals for the ninth circuit, and she prays that this appeal be allowed, and that a transcript of the record and proceedings and papers upon which said decree and judgment was made, duly authenticated, be sent to the said United States circuit court of appeals.

GEORGE D. COLLINS,
Attorney for said Appellant.

And now, to wit: on the 30th day of December, 1891, it is ordered that the foregoing appeal be allowed as prayed for; the appellant having filed her assignment of errors.

HAWLEY, *Judge.*

Endorsed: Filed December 30, 1891. L. S. B. Sawyer, clerk.

At a stated term, to wit, the November term, A. D. 1891, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, held at the court-room in the city and county of San Francisco, on Wednesday, the 30th day of December, in the year of our Lord one thousand eight hundred and ninety-one.

Present: The Honorable Thomas P. Hawley, U. S. district judge, district of Nevada.

22 FRANCISCA LEYBA DE MARTIN
v.
JAMES PHELAN. } No. 10884.

Order Allowing Appeal and Fixing Bond.

Upon motion of George D. Collins, Esq., counsel for complainant, it is ordered that an appeal to the United States circuit court of appeals for the ninth circuit, from the final decree heretofore filed and entered herein, be and the same hereby is allowed, and that a certified transcript of the record and all proceedings herein be forthwith transmitted to the said United States circuit court of appeals. It is further ordered that the bond for costs on appeal be and the same hereby is fixed at the sum of five hundred dollars.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to James Phelan, Greeting:

You are hereby cited and admonished to be and appear at a United States circuit court of appeals, for the ninth circuit, to be holden at the city of San Francisco, in the State of California, on the 25th day of January next, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the
23 northern district of California, wherein Francisca L. de Martin is appellant, and you are respondent, to show cause, if any there be, why the decree and judgment rendered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Thomas P. Hawley, acting judge of the United States circuit court, ninth circuit, for the northern district of California, this second day of January, A. D. 1892.

THOMAS P. HAWLEY,
U. S. Judge.

Endorsed: Service of the within citation, by copy thereof, on this 2nd day of January, 1892, is admitted. Wm. F. Herrin, attorney for respondent, James Phelan. Filed January 2, 1892. L. S. B. Sawyer, clerk U. S. circuit court, nor. dist. Cal.

Bond on Appeal.

Know all men by these presents: That we, Francisca L. de Martin, as principal, and Joseph Parker and C. Knickerbocker, as securities, are held and firmly bound unto James Phelan in the full and just sum of five hundred dollars, to be paid to the said
24 James Phelan, his certain attorney, executors, administators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this second day of January, in the year of our Lord one thousand eight hundred and ninety-two.

Whereas, lately at a session of the circuit court of the United States, for the northern district of California, in a suit pending in said court between Francisca L. de Martin as complainant, and James Phelan as defendant, a decree was rendered against the said Francisca L. de Martin, and the said Francisca L. de Martin having obtained from said court the allowance of an appeal to reverse the decree in the aforesaid suit, and a citation directed to the said James Phelan citing and admonishing him to be and appear at a United States circuit court of appeals for the ninth circuit, to be holden at San Francisco in the State of California.

Now, the condition of the above obligation is such that if the said

Francisca L. de Martin shall prosecute said appeal to effect, and answer all damages and costs, if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

[SEAL.] FRANCISCA L. DE MARTIN.
[SEAL.] JOSEPH PARKER.
[SEAL.] C. KNICKERBOCKER.

25 Acknowledged before me the day and year first above written.

F. D. MONCKTON,
Commissioner U. S. Circuit Court, Northern District of California.

UNITED STATES OF AMERICA, }
Northern District of California, } *ss:*

Joseph Parker and C. Knickerbocker being duly sworn, each for himself deposes and says that he is a freeholder in said district, and is worth the sum of five hundred dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

JOSEPH PARKER.
C. KNICKERBOCKER.

Subscribed and sworn to before me this 2d day of January, A. D. 1892.

F. D. MONCKTON,
Commissioner of U. S. Circuit Court, Northern District of California.

Endorsed: Form of bond and sufficiency of securities approved. Hawley, judge. Filed January 2, 1892. L. S. B. Sawyer, clerk U. S. circuit court, northern district Cal.

26 In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

FRANCISCA L. DE MARTIN }
v. } No. 10884.
JAMES PHELAN. }

Clerk's Certificate to Transcript.

I, L. S. B. Sawyer, clerk of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, do hereby certify the foregoing twenty-three written pages, numbered from 1 to 23 inclusive, to be a full, true and correct copy of the record, and all proceedings in the thereinentitled suit, and that the same together constitute the transcript of the record upon appeal to the United States circuit court of appeals for the ninth circuit.

In testimony whereof, I have hereunto set my hand, and affixed the seal of said circuit court, this 11th day of January, 1892.

[SEAL.] L. S. B. SAWYER,
Clerk U. S. Circuit Court, Northern District of California.

27 In the United States Circuit Court of Appeals for the Ninth Circuit.

DE MARTIN *vs.* PHELAN. } No. 26. Filed July 18, 1892.

Appeal from the circuit court of the United States for the northern district of California.

Before McKenna and Gilbert, circuit judges, and Deady, district judge.

By the court, McKENNA, *J.:*

This is a suit in equity to have a deed declared a mortgage, which was executed by plaintiff in favor of defendant, and that she be adjudged entitled to redeem.

The case is presented on bill and demurrer.

The plaintiff is a woman, and alleges that on the 4th of November, 1881, she was the owner, and seized in fee of certain lands which were subject to three mortgage liens, aggregating $185,000, two of which were foreclosed on the 13th of August, 1881, by judgment and decree. That prior to the decree defendant purchased all of said liens "as a means of securing the title to said property, and for no other purpose." That on said day plaintiff was in indigent circumstances and great need, and continued so until November 4th, 1881, which defendant knew; that he took advantage of her destitute condition, and by reason of said indebtedness purchased by him induced her to transfer said lands to him for the sum of $19,000 on said 4th of November, 1881, and make, execute and deliver to him a deed of conveyance, "because (to quote the language of the bill) of her helpless and destitute condition aforesaid, of which said defendant took advantage in securing said deed." That at that time her interest in said property, to wit, the equity of redemption, was of the value of $45,000 and more, which defendant knew.

28 The plaintiff also alleges that defendant has been absent from said State of California for a period aggregating four years since the 4th of November, 1881.

The defendant demurred to the bill on the grounds that plaintiff was not entitled to the relief prayed for or any relief; that it did not appear that the deed was intended as security for money loaned or indebted; that plaintiff does not show that the defendant took unfair advantage of her necessities, or exercised undue influence over her, or that she has ever notified him of her intention to rescind said deed, or offer to return the consideration therefor; and that the bill shows that she has been guilty of laches, and is barred

by section 343 of the Code of Civil Procedure of California. The court below sustained the demurrer, and plaintiff declined to amend.

It is not necessary to decide whether the bill sufficiently shows that defendant took unfair advantage of plaintiff, or exercised undue influence over her. Whatever her rights were, she was very lax in asserting them.

The bill says the deed was intended as a transfer of the property described in it; that the "oratrix did make, execute and deliver to said defendant a deed of conveyance." The intention then was clear. There was no misunderstanding or confusion about the kind of instrument she executed or intended to execute. It was a deed, not a mortgage. But it was obtained, she says, from her helplessness and destitution. These could not have continued for nearly ten years—the time which has elapsed since the making of the deed to the commencement of the suit.

Indeed, her destitution was relieved by the payment to her of $19,000, and whatever influence or fraud was practiced on her could not have continued very long, and she must have been able soon after the transaction to clearly review and estimate its character and value to her. It is not alleged that the circumstances which invested the transaction continued afterwards. When unembarrassed by poverty—when free from plaintiff's influence or fraud it was her right, if she desired, to rescind the transaction, or, putting it strongest for her, to claim the transaction as a loan and security. But the right should have been exercised and notified to the defendant within a reasonable time.

Twin Lick Oil Co. *vs.* Marbury, 91 U. S., 592.

We do not think that nine years and ten months — a reasonable time. If she was excused for four years on account of de-
29 fendant's absence from the State, she was not excused for four years and ten months of his presence in the State. The commencement of the suit is the first intimation of her dissatisfaction, and the plaintiff does not allege that defendant was absent from the State continuously for four years, but "for a period aggregating four years since the 4th of November, 1881." In other words, the "period" was a broken, not a continuous one, and she had, therefore, opportunities of communicating with him.

The plaintiff's counsel attempts to distinguish between a right to regard the instrument as a mortgage, and a right to regard it as a deed, and to rescind it, admitting in the latter case that section 343 of the Code of Civil Procedure controls, and that plaintiff is guilty of laches. We cannot entertain the distinction. There is a difference, great in material and legal effects, between a deed and a mortgage, but the difference does not indulge plaintiff's delay. That consists in not exercising within a reasonable time, a right the defendant's imposition or fraud gave her, which right did not grow out of or depend upon the character of the instrument she executed, and the defendant was as concerned to know—as entitled to know from plaintiff, she having the election—whether the instrument was to be regarded as a mortgage, with its consequences, as to know

whether it was to be rescinded absolutely with consequences which would follow.

The cases in which a person is held as a trustee *ex malificio* are clearly distinguishable from the one at bar.

There is no suggestion in the statute of limitations of the State. In fixing within what period a claim will become stale, the Supreme Court in Twin Lick Oil Co. *vs.* Marbury, cited *supra*, says: "We are but little aided by the analogies of statutes of limitation." And in Sullivan *vs.* Portland, etc., R. R. Co., 94 U. S., 811, says: "Every case is governed chiefly by its own circumstances; sometimes the statute of limitations is applied—sometimes a longer period than that prescribed by the statute is required; in some cases a shorter time is sufficient, and sometimes the rule is applied where there is no statutable bar. It is competent for the court to apply the inherent principles of its own system of jurisprudence, and to decide accordingly;" citing a number of cases.

Besides the plaintiff's laches is wholly independent of the statute of limitations.

Judgment is affirmed.

Endorsed: Filed July, 1892. F. D. Monckton, clerk.

30 United States Circuit Court of Appeals for the Ninth Circuit, October Term, 1891.

FRANCISCA L. DE MARTIN, Appellant,
v.
JAMES PHELAN. } No. 26.

Appeal from the circuit court of the United States for the northern district of California.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the northern district of California, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, affirmed, and the cause is remanded to said circuit court for such further proceedings as may be necessary, with costs.

31 [Endorsed:] No. 26. United States circuit court of appeals for the ninth circuit. October term, 1891. F. L. de Martin *v.* Jas. Phelan. Decree. Filed July 18, 1892. F. D. Monckton, clerk.

32 No. 26.

In the United States Circuit Court of Appeals for the Ninth Circuit.

FRANCISCA L. DE MARTIN, Appellant,
v.
JAMES PHELAN, Appellee.

Petition for Rehearing.

George D. Collins, counsel for petitioner.

Endorsed: Filed Jul- 28, 1892. F. D. Monckton, clerk.

33 In the United States Circuit Court of Appeals for the Ninth Circuit.

FRANCISCA L. DE MARTIN, Appellant,
v.
JAMES PHELAN, Appellee.

Petition for Rehearing.

To the honorable the United States circuit court of appeals for the ninth circuit, and to the judges thereof:

The appellant herein respectfully petitions for a rehearing of this cause and upon the following grounds, viz:

I.

The court is undoubtedly in error in ruling that the deed from appellant to appellee is not to be held a mortgage simply be-
34 cause it was intended as a deed. Under the circumstances narrated in the bill of complaint, the deed was in legal effect and by construction of equity nothing but a mortgage; true, it was not a conventional mortgage, nor need it be such to entitle the plaintiff to maintain a bill to redeem; it is enough if the circumstances are such as to render applicable that doctrine of chancery which holds a deed of the equity of redemption, made for an inadequate consideration by a necessitous debtor to his mortgagee, constructively a mortgage—not because the parties so intended, but because it is essential that the transaction be so considered in order that equity may make effective its principle governing the subject. To all intents and purposes, the deed intended by the parties as a conveyance is just as much a mortgage as though it purported to be such on its very face. It is upon that ground alone that bills to redeem have been entertained and sustained, notwithstanding the fact that the deed in question was intended to be an absolute conveyance of the title, and no attempt was ever made or even suggested that the deed first be set aside, rescinded or cancelled as such; but in every case the court proceeded and granted the relief on a bill to redeem and simply considered the deed a mortgage, although the parties had no such intention at the time of its execution.

And this practice is in strict accord with the principles of equity in analogous cases; in fact, it is a part of the history of equity jurisprudence, that when a debtor executed an absolute deed to his
35 creditor in payment of his indebtedness or as security for its payment, although it was intended that the title should vest absolutely in the creditor, the court of chancery held it to be but a mortgage and permitted a redemption despite the deed, even going so far as to hold that parol evidence was admissible to show the facts. It is hardly necessary, however, to advert to analogous cases to show that no matter what may be the intention of the parties, if the transaction is such as to come within the equitable doctrine of constructive mortgage, a redemption will be decreed without rescission or cancellation of the instrument intended as an absolute conveyance. The instrument is not disregarded, but its effect is restricted to that of a mortgage, and to all intents and purposes it is just as complete a mortgage as though it was entirely conventional and is to be given the same judicial recognition as though it purported on its face to be a mortgage and not a deed. If, then, the instrument before the court—the deed of November 4, 1881—was a formal mortgage, it at once becomes impressively obvious that the doctrine of rescission which dominates the opinion of the court, together with the inferential theory of laches which rests upon it, would have no more place in the case than the statute *de donis conditionalibus*. Nor is the argument even plausible, that the defendant was entitled to know whether the plaintiff elected to treat the deed as a mortgage; he is presumed to know the law, and having purchased under the
36 facts narrated in the bill, the doctrine of *caveat emptor* applies to him (Christy *v.* Sullivan, 50 Cal., 339), and he cannot be heard to say that he speculated on the possibility of the plaintiff reserving her objection until it was too late to urge it. He cannot be permitted to convert what equity deems a mortgage into a deed absolute. "Once a mortgage, always a mortgage," is one of the elementary principles of equity jurisprudence, and no court of chancery would be loyal to the fundamental law of its being did it permit the mere lapse of time to have the magic effect of transforming a mortgage into a deed. Before the advent of the decision in this case, it was never held that a period of ten years would bar the right to redeem. The limit prescribed was twenty years, and laches were never predicated on a shorter period. (Jarvis *v.* Woodruff, 22 Conn., 548; Hughes *v.* Edwards, 9 Wheat., 489; Slicer *v.* Bank of Pittsburg, 16 How., 571; Kinna *v.* Smith, 3 N. J. Eq., 16.) And it is therefore quite impossible to understand why laches should be found to exist in this case, as the suit was entered eight years and ten months after the day on which the transaction was had and the deed executed. The court is entirely in error, in asserting the period to be nearly ten years, and even if it was, on the point of laches, that would not be an unreasonable length of time, as is manifest from the authorities just cited. The court cites Twin Lick Oil Co. *v.* Marbury, 91 U. S., 592, in support of its views; but that case is differentiated from this by the character
37 of the property there involved, the fluctuating character of

which is expressly referred to by the court as the basis of its ruling; and besides, the court states explicitly that the rule it there applied would have no application to a case where real estate was the subject-matter of the litigation. Again, that was not a case of a mortgage, for that is *sui generis* and stands on its own peculiar basis. There, too, the doctrine of rescission was resorted to, on the point of laches; whereas in this case, that doctrine has no relevancy to the case, as we have already seen. In that case there existed an option to avoid the conveyance, and it was necessary to exercise that option, and, upon that theory, the defense of laches was sustained; in this case, there never was an option and no necessity of exercising one, as the transaction was a mortgage *ab initio*, by construction of law. The Marbury case was one of fraud; this case is not, and only incidentally involves the issue of undue influence. In short, if this case is viewed in the light of the authorities holding the transaction to be a mortgage, then all doubts vanish and the right of the plaintiff to redeem becomes clearly established; and if the court will determine the question of laches as applied to the right to redeem from a mortgage—the only proper method of deciding the question—it will readily perceive the error of its ruling in affirming the decree on the ground of laches.

38 We will now refer the court to some of the authorities supporting this, the first ground of our position. That the mortgagor knowingly surrendered, transferred the property and never intended to reclaim is of no consequence in a case of this nature, was expressly so adjudged in the parallel case of Villa *v.* Roderiguez, 12 Wall., 339, where that very language was used in deciding the point.

That the deed is in legal effect but a mortgage and a bill to redeem may be maintained without rescinding or cancelling it, is apparent from the following authorities:

Holridge *v.* Gillespie, 2 Johns. Ch., 30, per Kent, J.;
Shekel *v.* Hopkins, 2 Md. Ch., 90;
Dougherty *v.* McColgan, 6 Gill & J., 275;
Goodman *v.* Pledger, 14 Ala., 118;
Perkins *v.* Drye, 3 Dana, 117;
Villa *v.* Roderiguez, 12 Wall.;
2 Jones on Mortgages, § 1046.

II.

The court is in error in stating that nine years and ten months elapsed prior to the entry of suit. The deed was executed November 4, 1881, and this suit entered September 16, 1890, a period of eight years and ten months; deducting the four years of defendant's absence from the State, leaves a period of four years and ten months.

39 III.

The court erred in disregarding the State statute of limitations and in resorting to the doctrine of laches in its stead.

If the statute of limitations governs the case, the doctrine of laches

has no application. In the case of Norris *v.* Haggin, 12 Sawyer, 51, 52, the court held that the United States courts sitting in equity were in duty bound to apply the State statute of limitations, and cited many cases to show that such is the law as declared by the national Supreme Court, and the case is the more pertinent in view of the fact that Sawyer, J., confessed that he was mistaken in asserting the law to be precisely what it is declared to be by this court in the case which is the subject of this petition.

In support of our position that the State statute governs the case, in addition to the authority just cited, we refer the court to the cases of Cross *v.* Allen, 141 U. S., 537; Michoud *v.* Girod, 4 How., 561; Manning *v.* Hayden, 5 Sawyer, 380. It would be strange indeed if this case would be governed by the State statute of limitations, and not by the doctrine of laches, if it had been instituted in the State court, and conversely by the doctrine of laches and not the statute of limitations when entered in the Federal courts. Such a conflict of law would tend very much to disturb the constitutional
40 harmony of the two governments and subject the rights of litigants to the disposition of two sets of laws, the one directly opposed to the other.

Nor do the cases cited by this court in support of its views at all militate against our position. The case of Twin Lick Oil Co. *v.* Marbury, 91 U. S., 592, was determined upon a state of facts that excluded the possibility of a State statute of limitations. The case went to the supreme court from the District of Columbia, and the court was not therefore in any respect concerned with the statute of limitations. The question of lapse of time had to be determined by the court from "the inherent principles of its own system of jurisprudence, and to decide accordingly," for it had no other guide. Say the court: "We are but little aided by the analogies of statutes of limitation"; that is, by statutes of limitation generally. If the case had originated in one of the States, where there was a statute of limitation applicable to the subject, the decision of the court would clearly have enforced the prescription of the statute; but there being no such statute, the court could not derive an analogy from "statutes (plural) of limitation" generally, and hence, of necessity, had to apply "the inherent principles of its own system of jurisprudence." Under no proper consideration of the case can the ruling in Twin Lick Co. *v.* Marbury be held applicable.

Nor is the case of Sullivan *v.* Portland R. R. Co., 94 U. S., 811, an authority in support of the opinion and decision of this court.
41 The court did not there hold that the statute of limitations did not bind a United States court sitting in equity, but it was held that the statute could not be considered as it had not been properly plead; if that objection had not existed, it is very clear from the court's opinion that the statute would have governed the case, and not the equity doctrine of laches. As there was no other guide, the court was compelled to "apply the inherent principles of its own system of jurisprudence and to decide the case accordingly;" a thing it would not have done had the statute of limitations been

before the court. This is the interpretation given the case in Norris *v.* Haggin, 12 Sawyer, 47, and is undoubtedly the correct one.

Applying, then, the State statute of limitation to the case, and giving full effect to the argument presented herein under our first ground for a rehearing, the deed of November 4, 1881, must be held to be to all intents and purposes a mortgage, and turning to section three hundred and forty-six of the Code of Civil Procedure of California, we find a specific limitation in respect to the right to redeem from a mortgage, where the mortgage is in possession, and that period is five years; and again referring to section three hundred and fifty-one of the same code, we find that "if, when the cause of action accrues against a person, he is out of the State, the action may be commenced within the term * * * limited, after his return to the State, and if, after the cause of action accrues,
42 he departs from the State, the time of his absence is not part of the time limited for the commencement of the action." (44 Cal., 280.) And the supreme court of the State has held that successive absences are to be aggregated and then deducted from the statutory limitation (Rogers *v.* Hatch, 44 Cal., 280).

Applying that law to this case, and deducting the four years of defendant's absence from the period that has elapsed intermediate the time of the execution of the deed and the commencement of this suit, and the result is, four years and ten months; which brings the case within the statutory period of five years (§ 346, C. C. P.), by two months.

As we have shown, the court is bound to apply the limitation prescribed by the State statute, and that necessarily excludes the doctrine of laches. As pointed out in Norris *v.* Haggin, 12 Sawyer, 51, 52, the State statute applies to all cases both at law and in equity, and is obligatory on the Federal courts of equity *proprio vigore* in cases of concurrent jurisdiction, and by analogy in cases of exclusive jurisdiction in equity. If the statute only applied to cases at law, then it could only apply by analogy to cases of concurrent jurisdiction in equity, but as it applies to cases in equity as well as at law, it is equally applicable by analogy to cases within the exclusive jurisdiction of courts of equity (Norris *v.* Haggin, 12 Sawyer, 51, 52), sitting in the Federal jurisdiction.

43 It is quite clear, therefore, that the court erred in applying the doctrine of laches to the case; for first, ten years, or any period short of twenty years, has never been held to bar the right to redeem; and secondly, the statute of limitations alone governs the subject and establishes the plaintiff's right to maintain the suit, and the doctrine of laches does not pertain to the case or to any case where the statute of limitations governs either *proprio vigore* or by way of analogy. (Cross *v.* Allen, 141 U. S., 537.)

IV.

The court is in error in stating that "plaintiff's counsel attempts to distinguish between a right to regard the instrument as a mortgage and a right to regard it as a deed and to rescind it, admitting

in the latter case that section 343 of the Code of Civil Procedure controls and the plaintiff is guilty of laches." Plaintiff's counsel never at any time admitted that plaintiff was guilty of laches, but, on the contrary, strenuously opposed such a proposition at all times; what counsel did concede was this: that if a rescission was necessary, section 343 of the code applied to the case; but we have always contended and still maintain that both upon principle and authority, no rescission is necessary or even proper; that the deed is in legal effect but a mortgage—a constructive mortgage, 'tis true—but a mortgage just as completely as though it had been so agreed by the parties. We will not repeat the discussion of this ques-
44 tion here, but will refer the court to the points and authorities to be found under the first ground hereinbefore presented as one of the reasons why a rehearing should be granted.

V.

This court had before it the opinion of the circuit court on the order sustaining the demurrer. That opinion is to be found in the brief of the appellee, and it indicates that the demurrer was not sustained on the ground of laches; if it had been, the appellant would have amended and shown satisfactory reason for the delay; as she was not cognizant of her rights until within a short period preceding litigation, and she then presented her objections to the State courts in an action instituted against her by the appellee; but those objections were not passed on by the State courts, and she thereupon instituted a suit on her own behalf in the Federal courts. She relied on the opinion of the circuit court in electing not to amend, as she could not by amendment improve her case so as to meet the objection sustained by that court, and she thereupon appealed for the purpose of securing redress, and now the appellate court, instead of passing upon the ground on which the lower court sustained the demurrer, entirely ignores it, and rules upon another and entirely different ground, that must be held to have been resolved in favor of the appellant by the court below, and upon that basis affirms the judgment! We respectfully submit that this course is most unfair
45 to a litigant, and while we can readily appreciate that the reasoning of a court is no part of its decision, yet the ground upon which it sustains a demurrer is of the very essence of the decision, and is wholly independent of the reasoning which led to its support; and it seems to us that it is an exercise of original and not of appellate jurisdiction for a court of review to affirm a judgment rendered on demurrer upon a ground which had been virtually ruled in favor of the appellant by the court below—at all events, upon a ground of demurrer entirely different from that upon which the judgment was based by the court which rendered it. The plaintiff has certainly been misled by the decision of the lower court, if the appellate court finally disposes of the case upon a ground essentially different from that on which it was decided in the court below, and which might have been obviated by the plaintiff had it not been virtually ruled in her favor by the circuit court.

We respectfully submit that there is nothing in the bill to show that the defendant has been injured by the lapse of time, or that he is in any worse position now than he was the very next day after the transaction, and therefore, even if the doctrine of laches did control, it should not be applied in this case, since the mere lapse of time can never at law or in equity destroy a right, unless of course, it be found in a statute of limitations—an entirely different matter from laches. The burden is on the defendant to show that
46 he has been injured by the lapse of time, and there is no such showing in this case. Indeed it has been stated to be one of the maxims of chancery that "Length of time no objection in equity to redemption" (Barton's Digest of Legal Maxims, p. 284).

Above all, it must be laid down with emphasis that it is not only unnecessary but improper to rescind, or set aside, or cancel the deed of November 4, 1881, for under the authorities hereinbefore cited, in the eyes of the law, that instrument is constructively a mortgage. As was said in Villa *v.* Roderiguez, 12 Wallace, 323, *per curia*, in respect to a similar instrument: "The law upon the subject of the right to redeem where the mortgagor has conveyed to the mortgagee the equity of redemption is characterized by a jealous and salutary policy * * * The form of the instrument is immaterial. That the mortgagor knowingly surrendered and never intended to reclaim, is of no consequence."

Thus this court must perceive its error in disposing of the case upon the theory that the instrument of November 4, 1881, is a deed, and that it is necessary to rescind or cancel it before the plaintiff's right to redeem can become established, and that defendant had the right to know whether it was to stand as a deed or a mortgage. It never was a deed, and as the defendant was a party to the transaction, he must be held to have known *ab initio*, that the instrument was nothing more than a mortgage, from which the plaintiff had the right to redeem, and that by virtue of section 346 of the
47 Code of Civil Procedure of California, that right could be exercised at any time before he acquired a title by adverse possession (Hall *v.* Arnott, 80 Cal., 355, 356).

The court seems to overlook the fact that this is a bill to redeem, and therefore that no other limitation is applicable to the case than that pertaining to bills of redemption. Rescission, cancellation, annullment and revocation are all essentially foreign to the case, and a reference to either of them is not only erroneous but positively misleading.

We respectfully submit that upon principle and authority, and, upon the very justice of the case, the appellant is entitled to a rehearing and she respectfully petitions the court that such be its order.

FRANCISCA L. DE MARTIN, *Petitioner.*

GEORGE D. COLLINS,
Counsel for Petitioner.

UNITED STATES OF AMERICA,
Northern District of California, } ss:

This is to certify that I, George D. Collins, an attorney and counsellor of the United States circuit court of appeals for the ninth circuit, and of the Supreme Court of the United States of America, have duly, carefully and diligently examined the foregoing petition for a rehearing, and that I believe it to be well founded in point of law and of fact.

In witness whereof, I have hereunto set my hand this 28th day of July, A. D. 1892.

GEORGE D. COLLINS,
Counsel for Petitioner.

48 At a stated term, to wit, the October term, A. D. 1892, of the United States circuit court of appeals for the ninth circuit, held at the court-room, in the city and county of San Francisco, on Thursday, the nineteenth day of January, in the year of our Lord one thousand eight hundred and ninety-three.

Present: The Honorable William B. Gilbert, circuit judge; Honorable C. H. Hanford, district judge; Honorable Thomas P. Hawley, district judge.

FRANCISCA L. DE MARTIN, Appellant,
vs.
JAMES PHELAN. } No. 26.

It having been duly made to appear to the court that since the submission of the petition for a rehearing herein and prior to the determination thereof that James Phelan, the appellee, died at the city and county of San Francisco, State of California, and his personal representatives not having come voluntarily in and become parties to this suit, it is now, therefore, ordered, on motion of counsel for appellant, that unless the personal representatives of said James Phelan, deceased, shall become parties to this suit within sixty days the appellant herein shall be entitled to open the
49 record and, on hearing, have the judgment and decree reversed if it be erroneous.

It is further ordered that the order heretofore made denying said petition for a rehearing be, and the same is hereby, vacated and set aside.

I hereby certify that the foregoing is a full, true, and correct copy of an original order made and entered in the within-entitled cause.

[SEAL.] Attest my hand and the seal of said circuit court of appeals this 31 day of Jan'y, A. D. 1893.

F. D. MONCKTON, *Clerk.*

50 In the United States Circuit Court of Appeals for the Ninth Circuit.

FRANCISCA L. DE MARTIN, Appellant,
vs.
JAMES PHELAN, Appellee. } No. 26.

Alice Phelan, James D. Phelan, and Alice P. Sullivan, the duly appointed and qualified executors of the last will and testament and codicils thereto of James Phelan, deceased, appellee herein, as appears by the annexed certified copy of letters testamentary issued to them out of the superior court of the city and county of San Francisco, State of California, on the 13th day of January, 1893, do hereby, by Wm. F. Herrin, Esq., their solicitor, in accordance with the annexed certified copy of the order of this court made and entered herein on the 19th day of January, 1893, as the personal representatives of said James Phelan, deceased, enter their appearance as appellees herein in the place and stead of said James Phelan, deceased, and I do hereby enter my appearance herein as their solicitor.

WM. F. HERRIN,
Solicitor for said Alice Phelan, James D. Phelan, and Alice P. Sullivan.

Dated March 1, 1893.

51 At a stated term, to wit, the October term, A. D. 1892, of the United States circuit court of appeals for the ninth circuit, held at the court-room, in the city and county of San Francisco, on Thursday, the nineteenth day of January, in the year of our Lord one thousand eight hundred and ninety-three.

Present: The Honorable William B. Gilbert, circuit judge; Honorable C. H. Hanford, district judge; Honorable Thomas P. Hawley, district judge.

FRANCISCA L. DE MARTIN, Appellant,
vs.
JAMES PHELAN. } No. 26.

It having been duly made to appear to the court that since the submission of the petition for a rehearing herein and prior to the determination thereof that James Phelan, the appellee, died at the city and county of San Francisco, State of California, and his personal representatives not having come voluntarily in and become parties to this suit, it is now therefore ordered, on motion of counsel for appellant, that unless the personal representatives of said James Phelan, deceased, shall become parties to this suit within sixty days the appellant herein shall be entitled to open the record and
52 on hearing have the judgment and decree reversed, if it be erroneous.

It is further ordered that the order heretofore made denying said petition for a rehearing be, and the same is hereby, vacated and set aside.

I hereby certify that the foregoing is a full, true, and correct copy of an original order made and entered in the within-entitled cause.

[SEAL.] Attest my hand and the seal of said circuit court of appeals this 31 day of Jan'y, A. D. 1893.

F. D. MONCKTON, *Clerk.*

53 *Letters Testamentary.*

In the Superior Court in and for the City and County of San Francisco, State of California.

Department No. 9. Probate. # 13073.

The last will and codicils thereto of James Phelan, deceased, a copy of which is hereunto annexed, having been proved and recorded in the superior court in and for the city and county of San Francisco, Alice Phelan, James D. Phelan, Alice P. Sullivan, who are named herein, are hereby appointed executors.

Seal of the Superior Court. Witness M. C. Haley, clerk of the superior court in and for the city and county of San Francisco, with the seal of said court affixed, this 13 day of January, A. D. 1893.

By order of the court:

M. C. HALEY, *Clerk,*
By E. P. CASSERLY, *Deputy Clerk.*

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

I do solemnly swear that I will support the Constitution of the United States and the constitution of the State of California, and that I will faithfully discharge the duties of executors of the
54 last will and testament of James Phelan, deceased, according to law.

ALICE PHELAN.
JAMES D. PHELAN.
ALICE P. SULLIVAN.

Subscribed and sworn to before me this 13th day of Jan'y, 1893.

E. P. CASSERLY,
Deputy County Clerk of the City and County of San Francisco.

Office of the County Clerk of the City and County of San Francisco, *ss:*

I, M. C. Haley, county clerk of the city and county of San Francisco and *ex officio* clerk of the superior court thereof, do hereby certify the foregoing to be a full, true, and correct copy of the letters testamentary issued in the matter of the last will and testament and codicils thereto of James Phelan, deceased, now on file and of record in my office, and I further certify that the same have not been revoked or vacated, but are still of full force and effect.

4—26

Witness my hand and the seal of said court this 16th day of Jan'y, A. D. 1893.

M. C. HALEY, *Clerk*,
By JOS. I. TWOHIG, *Deputy Clerk*.

(Endorsed:) Certified copy letters testamentary. Issued January 13, 1893, to Alice Phelan, James D. Phelan, Alice P. Sullivan. Duplicate filed Jan. 13, 1893. M. C. Haley, clerk, by E. P. Casserly, deputy clerk.

55 (Endorsed:) No. 26. In the United States circuit court of appeals for the ninth circuit. Francisca L. de Martin, appellant, *vs.* James Phelan, appellee. Appearance of personal representatives of appellee and appearance of Wm. F. Herrin, as their solicitor. Filed March 4, 1893. F. D. Monckton, clerk.

56 In the United States Circuit Court of Appeals for the Ninth Circuit.

FRANCISCA L. DE MARTIN, Appellant,
vs.
JAMES D. PHELAN, ALICE PHELAN, and ALICE P. SULLIVAN, Executor and Executrices, Respectively, of the Last Will and Testament of James Phelan, Deceased, Substituted Defendants Herein in Place of James Phelan, Appellees.

Notice is hereby given unto you that on Monday, the 24th day of April, 1893, at the city of Washington, the appellant herein will apply to the Supreme Court of the United States of America for a writ of certiorari to be directed to the United States circuit court of appeals for the ninth circuit and commanding the production of the record herein, that the same may be reviewed, and that thereupon such judgment shall be passed thereon as shall be most conformable to the law of the land.

Said application will be made under the provisions of section six of the act of Congress establishing the circuit court of appeals.

57 Respectfully, GEORGE D. COLLINS,
Counsel for Appellant.

To the said James D. Phelan, Alice Phelan, and Alice P. Sullivan, executor and executrices, respectively, of the last will and testament of James Phelan, deceased, substituted defendants herein in the place and stead of said James Phelan, and to William F. Herrin, Esq., their counsel.

Dated at San Francisco this 17th day of April, 1893.

(Endorsed:) No. 26. In the United States circuit court of appeals for the ninth circuit. Francisco L. de Martin, appellant, *vs.* James D. Phelan *et al.*, appellees. Notice of motion for writ of certiorari to be issued by Supreme Court of the United States. Receipt of the within notice on this 17th day of April, 1893, is hereby admitted. Wm. F. Herrin, counsel for appellees. Filed Apr. 17, 1893. F. D. Monckton, clerk.

58 At a stated term, to wit, the October term, A. D. 1892, of the United States circuit court of appeals for the ninth circuit, held at the court-room, in the city and county of San Francisco, on Monday, the seventeenth day of April, in the year of our Lord one thousand eight hundred and ninety-three.

Present: The Honorable Joseph McKenna, circuit judge; Honorable William B. Gilbert, circuit judge; Honorable Thomas P. Hawley, district judge.

FRANCISCA L. DE MARTIN, Appellant,
vs.
JAMES D. PHELAN *et al.* } No. 26.

On motion of W. F. Herrin, Esquire, counsel for appellees, George D. Collins, Esquire, counsel for appellant, consenting, it is ordered that James D. Phelan, Alice Phelan, and Alice P. Sullivan, executor and executrices, respectively, of the last will and testament of James Phelan, deceased, be, and they are hereby, substituted as appellees herein in the place and stead of said James Phelan, deceased.

On motion of said W. F. Herrin, it is further ordered that the petition of the appellant for a rehearing herein be, and the same is hereby, denied.

On motion of said George D. Collins, it is further ordered that the issuance of a mandate herein be, and the same is hereby, stayed for a period of sixty days from date.

59 I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing to be a full, true, and correct copy of the printed transcript of the record, the opinion of the court, the decree, petition for rehearing, order that the personal representatives of James Phelan, deceased, appear and become parties to the suit, appearance of personal representatives, order substituting personal representatives, denying petition for rehearing and staying issuance of mandate, and notice of motion for writ of certiorari to be issued by the Supreme Court of the United States in the cause entitled Francisca L. de Martin, appellant, *vs.* James D. Phelan, executor, etc., *et al.*, No. 26, in said United States circuit court of appeals, as the originals thereof appear on file and remain of record in my office.

Seal United States Circuit Court of Appeals, Ninth Circuit.

In witness whereof I have hereunto set my hand and the seal of said United States circuit court of appeals, at San Francisco, this 18th day of April, A. D. 1893.

F. D. MONCKTON, *Clerk.*

60 [Endorsed:] No. 26. U. S. circuit court of appeals for the ninth circuit. Francisca L. de Martin, appellant, *vs.* James D. Phelan, ex'r, &c., *et al.* Certified copy printed record, &c.